No. 91-761

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In The

Supreme Court of the United States

October Term, 1991

THE PENN CENTRAL CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, CONSOLIDATED RAIL CORPORATION, and SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AND CONSOLIDATED RAIL CORPORATION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Was not the United States Court of Appeals for the Third Circuit correct when it held that the consummation order entered in a 1978 railroad reorganization under section 77 of the now repealed Bankruptcy Act did not bar a claim against the reorganized company under the subsequently enacted Comprehensive Environmental Response, Compensation and Liability Act?

DESIGNATION OF CORPORATE RELATIONSHIPS

Consolidated Rail Corporation is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railway Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Ltd.; Trailer Train Company; and Transportation Data Xchange. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

Southeastern Pennsylvania Transportation Authority is not owned by any parent corporation, owns no subsidiaries, and has no corporate affiliates.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Southeastern Pennsylvania Transportation Authority ("SEPTA") and Consolidated Rail Corporation ("Conrail") respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. The opinion is reported at 944 F.2d 164 (3d Cir. 1991).

COUNTER-STATEMENT OF THE CASE

The Penn Central Reorganization

On June 21, 1970, the Penn Central Transportation Corporation ("PCTC") initiated in the United States District Court for the Eastern District of Pennsylvania what would become an eight-year long reorganization under Section 77 of the former Bankruptcy Act,[1] as supplemented by the Regional Rail Reorganization Act (the "Rail Act").[2] On April 1, 1976, pursuant to the Final System Plan established under the Rail Act,[3] Penn Central's bankruptcy trustees conveyed certain of PCTC's rail assets, including a railroad yard in Paoli, Pennsylvania (the "Paoli Yard"), to Conrail.[4] Conrail immediately

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[1] The Bankruptcy Act of 1898, as amended, § 77, former 11 U.S.C. § 205. The Bankruptcy Act was replaced prospectively by the Bankruptcy Reform Act of 1978, the current Bankruptcy Code, which went into effect on October 1, 1979.

[2] 45 U.S.C. §§ 701-97m.

[3] *See* 45 U.S.C. §§ 716-18.

[4] *In the Matter of Penn Central Transportation Co.*, 944 F.2d 164, 165 (3d Cir. 1991) (A5).

reconveyed the Paoli Yard to the National Rail Passenger Corporation ("Amtrak"), which has remained its owner until the present time.[5]

The Penn Central reorganization was completed on October 24, 1978 (the "Consummation Date"). The Consummation Order entered by the Honorable John P. Fullam discharged pre-consummation claims and enjoined the pursuit of actions against the reorganized company based on pre-consummation claims, except as permitted under Penn Central's Reorganization Plan. Following the Consummation Date, Judge Fullam retained jurisdiction to supervise the effectuation of the Reorganization Plan and to enforce the provisions of the Consummation Order.[6]

The reorganized company changed its name to the Penn Central Corporation ("PCC"). PCC retained many of PCTC's assets, received $2.1 billion from the Federal government as payment for PCTC rail assets transferred under the Final System Plan, and had the benefit of $1.8 billion in net tax loss carry-forwards accumulated during its pre-consummation railroad operations.[7] Since its reorganization, PCC has operated successfully by engaging in a variety of ongoing non-railroad businesses.[8]

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[5] *Id.* (A5-A6).

[6] *Id.* at 165-66 (A6-A8).

[7] *Id.* at 169 (A15).

[8] *Id.* (A16).

The Paoli Yard

Penn Central, directly or through its bankruptcy trustees, operated the Paoli Yard from approximately 1915 through 1976. As of April 1, 1976, Congress required Conrail to begin operating commuter service for SEPTA using railroad facilities that included Amtrak's Paoli Yard.[9] Conrail continued to provide commuter service for SEPTA until Congress relieved Conrail of that obligation in the Northeast Rail Services Act.[10] Beginning on January 1, 1983, SEPTA operated its own commuter service and Conrail ceased its use of the Paoli Yard. Polychlorinated biphenyls ("PCBs") had been used at the Paoli Yard for over thirty years before Penn Central filed for reorganization in 1970, and PCBs continued to be used during the six-year period in which Penn Central's bankruptcy trustees operated the Yard.[11]

Environmental Regulation

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[12] In CERCLA, Congress for the first time imposed strict liability for the costs of cleaning up

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[9] *See* 45 U.S.C. § 744.

[10] 45 U.S.C. § 744a.

[11] *In the Matter of Penn Central Transportation Co.*, 944 F.2d at 165 (A5).

[12] 42 U.S.C. §§ 9601-57.

releases of "hazardous substances," a broadly defined group of substances that included PCBs. Under CERCLA, liability was imposed on both present and past owners and operators of facilities where releases of hazardous substances had occurred.

Six years after CERCLA's enactment, the United States of America brought a civil action in the United States District Court for the Eastern District of Pennsylvania, pursuant to sections 104, 106(a), and 107 of CERCLA, against SEPTA, Conrail, and Amtrak. The suit sought to compel the cleanup of PCBs at the Paoli Yard and also sought reimbursement of costs already incurred and to be incurred by the United States in cleaning up past or threatened releases of PCBs at and from the Paoli Yard. In addition and at approximately the same time, numerous individuals instituted suits in state and federal courts against SEPTA, Conrail, and Amtrak to recover for personal injuries and property damage allegedly caused by PCB use at the Paoli Yard.

This Case

The United States, SEPTA, Conrail, and various individuals petitioned the Honorable John P. Fullam for a declaration that the discharge obtained by PCTC under section 77 of the Bankruptcy Act and the injunction contained in the Consummation Order did not bar the assertion of direct and third-party CERCLA claims against PCC in the government action or the assertion of direct and third-party claims in the private actions involving allegations of personal injuries and property damage arising from the use of PCBs at the Paoli Yard before the

Consummation Date. In one Order and Memorandum, Judge Fullam held that the Third Circuit's ruling in *Schweitzer v. Consolidated Rail Corporation*[13] required a holding that the individuals, SEPTA, and Conrail could pursue claims against PCC in the private actions.[14] However, in a second Order and Memorandum, Judge Fullam held that the Consummation Order entered in the Penn Central reorganization barred the United States, Conrail, and SEPTA from pursuing CERCLA claims against PCC despite the fact that CERCLA had yet to be enacted when the Consummation Order had been entered in 1978.[15]

PCC did not appeal the ruling permitting the individuals, Conrail, and SEPTA to pursue the claims involving allegations of personal injuries and property damage arising from Penn Central's pre-consummation activities at the Paoli Yard. The United States, Conrail, and SEPTA did appeal the ruling that barred CERCLA claims involving the same pre-consummation activities.

The Court of Appeals for the Third Circuit reversed the district court and held that the United States, Conrail, and SEPTA could pursue CERCLA claims against PCC. As the Third Circuit explained, CERCLA claims were not and could not have been discharged as of the 1978 consummation of the Penn Central reorganization proceeding because no legal basis for asserting such

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[13] 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

[14] *In the Matter of Penn Central Transportation Co.*, 92 B.R. 605 (E.D. Pa. 1988) (A17-24).

[15] *In the Matter of Penn Central Transportation Co.*, Bankr. L. Rep. ¶ 73,594 (E.D. Pa. 1990) (A25-41), *rev'd*, 944 F.2d 164 (3d Cir. 1991) (A1-16).

claims could have existed before the 1980 enactment of CERCLA.[16]

REASONS FOR DENYING THE PETITION

A. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE QUESTION PCC PRESENTED BECAUSE IT INVOLVES A REORGANIZATION THAT WAS BOTH CONDUCTED UNDER A REPEALED BANKRUPTCY STATUTE AND CONCLUDED BEFORE THE ENACTMENT OF CERCLA.

PCC urges this Court to grant its petition for a writ of certiorari to address "important issues at the intersection of bankruptcy law and environmental law."[17] This case is not at that intersection, however, because the bankruptcy reorganization proceeding at issue *predates* both CERCLA and the Bankruptcy Code, the two statutes central to current discussions of the relationship between bankruptcy and environmental law.

Penn Central filed for reorganization under section 77 of the Bankruptcy Act.[18] Both the consummation of the Penn Central reorganization and the enactment of the

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[16] *In the Matter of Penn Central Transportation Co.*, 944 F.2d at 168 (A12).

[17] PCC's Petition, at 11.

[18] Bankruptcy Act of 1898, as amended, § 77, former 11 U.S.C. § 205 (repealed 1978).

current Bankruptcy Code[19] occurred in 1978. Furthermore, even when the Bankruptcy Act was in effect, section 77 of that statute applied only to a very limited group of debtors, operating railroads. Not only was section 77 extremely limited in applicability, but Penn Central's section 77 reorganization was also governed by provisions of the Rail Act, which applied only to certain reorganizing railroads in the Northeast and Midwest.[20]

The fact that this case arises out of the repealed section 77 is important. Section 77 had a materially different definition of "claim" than that contained in the current Bankruptcy Code. Section 77(b) of the Bankruptcy Act defined "claims" as "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." While that definition of "claim" was broad, it did not include a critical concept of current bankruptcy law. The Bankruptcy Code now incorporates within the definition of "claim" a "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment . . . "[21] The two leading decisions that have previously addressed the dischargeability of environmental claims in bankruptcy proceedings, *Ohio v. Kovacs*[22] and *In re Chateaugay Corp. ("LTV")*,[23] both interpreted that Bankruptcy Code

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[19] Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330.

[20] Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-97m.

[21] 11 U.S.C. § 101(5).

[22] 469 U.S. 274 (1985).

[23] 944 F.2d 997 (2d Cir. 1991).

definition of a claim. While PCC alleges that the holding in this case conflicts "in principle" with *LTV*, the Second Circuit in *LTV* and the Third Circuit in this case were interpreting significantly different statutes.

Furthermore, the Penn Central bankruptcy reorganization concluded nearly 14 years ago. At that time, awareness of environmental cleanup issues was far less acute than it is today and there were fewer legal remedies for pollution. Once CERCLA became law in 1980, prospective debtors were on notice of potential liability for the cleanup of past hazardous waste disposal.[24] Obviously, neither the debtor nor the claimants in the Penn Central bankruptcy reorganization could have known of this liability when the reorganization was concluded in 1978, and, not surprisingly, the Penn Central Reorganization Plan did not provide for future environmental claims. Now, environmental issues regularly arise in pending bankruptcy cases. This Court, if it wishes to consider further the interplay between bankruptcy and environmental laws, will no doubt have many opportunities to review cases involving the dischargeability of environmental claims. And, rather than years after a reorganization is completed, that review can occur at a stage of a reorganization when a plan of reorganization has yet to go into effect and when related issues of the propriety of injunctive relief, administrative priority, and post-petition cleanup expenses can also be considered.

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[24] *See, e.g., LTV*, 944 F.2d at 1005.

B. THE COURT OF APPEALS DECISION IS CORRECT AND DOES NOT CONFLICT WITH BANKRUPTCY DECISIONS OF THIS COURT OR ANY CIRCUIT COURT.

That finality and a fresh start are the desired and desirable ends of the reorganization process is virtually a cliché in bankruptcy jurisprudence. It is common for courts to state, as did the Third Circuit in this case, that "in the context of bankruptcy 'the need for finality and certainty is especially acute.' "[25] However, the Third Circuit recognized, as PCC has not, that such a sweeping statement does not resolve the question presented here. Examination of the cases on which PCC relies to argue that the Third Circuit's decision "undermines the protection and fresh start afforded by Congress to a reorganized company" shows that those cases either support or are irrelevant to the Third Circuit's holding that Respondents can pursue CERCLA claims against PCC.

As an initial matter, it must be noted that PCC's focus in its petition on the Third Circuit's decision in *In re M. Frenville Co.*[26] is puzzling. The Third Circuit did not even cite that case in its opinion. The *Frenville* decision and comments about that decision are irrelevant here.

To decide this case, the Third Circuit relied primarily on its prior decisions in *Schweitzer v. Consolidated Rail Corporation*[27] and *Zulkowski v. Consolidated Rail Corporation.*[28] The claims at issue in *Schweitzer, Zulkowski,* and

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[25] 944 F.2d at 166-67 (A9) (citations omitted).

[26] 744 F.2d 332 (3d Cir. 1984), *cert. denied,* 469 U.S. 1160 (1985).

[27] 758 F.2d 936 (3d Cir.), *cert. denied,* 474 U.S. 864 (1985).

[28] 852 F.2d 73 (3d Cir.), *cert. denied,* 488 U.S. 994 (1988).

this case are all based on statutes. In *Schweitzer* and *Zulkowski*, the Third Circuit held that no claim existed under the Federal Employer's Liability Act[29] at the time of a railroad's reorganization under section 77 of the Bankruptcy Act, as supplemented by the Rail Act, because a compensable tort does not arise under the FELA until a railroad worker has a manifest injury.[30] In this case, the Third Circuit has held that a claim for hazardous waste cleanup costs under CERCLA could not come into existence until, at the earliest, Congress enacted CERCLA in 1980.[31]

As the Third Circuit explained, for a claim to have existed and been dischargeable in the Penn Central reorganization proceeding, there must have then been an existing legal relationship between Penn Central and the Respondents that was relevant to the legal basis for Respondents' claims.[32] Respondents' claims are not "predicated *solely* on polluting acts", as PCC implies in its statement of the question, for a claim requires a legal as well as a factual basis.[33] The passage of CERCLA, as the Second Circuit acknowledged in *LTV*, created a legal relationship between a debtor and a hazardous waste cleanup claimant that could give rise to a claim.[34] The

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[29] 45 U.S.C. §§ 51-60.

[30] *Schweitzer*, 758 F.2d at 942; *Zulkowski*, 852 F.2d at 76.

[31] 944 F.2d at 167 (A11).

[32] *Id.* at 167-68 (A11). *See also Schweitzer*, 758 F.2d at 943.

[33] 944 F.2d. at 167 (A11).

[34] *LTV*, 944 F.2d at 1005.

Third Circuit has correctly held here that claims for hazardous waste cleanup were outside the definition of claim before the passage of CERCLA because, before then, there was no legal basis upon which either an existing or contingent claim could be premised.[35]

The cases PCC cites do not in any way undermine the propriety of the Third Circuit's holding. In *Gardner v. New Jersey*,[36] the first of this Court's opinions cited by PCC, this Court, describing the filing of a proof of claim as a "method of collecting a debt," held that a claim for state taxes that would be enforceable outside a bankruptcy court constituted a dischargeable claim in a reorganization proceeding conducted under section 77 of the Bankruptcy Act.[37] In *Pennsylvania Department of Public Welfare v. Davenport*,[38] the second of this Court's opinions cited by PCC, this Court, describing a claim as "nothing more or less than an enforceable obligation", affirmed the Third Circuit's holding that criminal restitution obligations were dischargeable in a bankruptcy proceeding.[39] Finally, in *Grady v. A.H. Robins Co.*,[40] a Fourth Circuit case cited by PCC, the court of appeals held that future claims for injuries that might yet be caused by the debtor's product were "claims" for the purposes of enforcing the

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[35] 944 F.2d at 167-68 (A11).

[36] 329 U.S. 565 (1947).

[37] *Id.* at 572-73.

[38] 495 U.S. 552, 110 S.Ct. 2126 (1990).

[39] *Id.* 110 S.Ct. at 2131.

[40] 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988).

automatic stay provision of the Bankruptcy Code, but the Fourth Circuit explicitly did *not* decide whether such future product liability claims were *dischargeable* in a reorganization proceeding.[41]

Nothing in the cases PCC has cited supports its contention that CERCLA claims were dischargeable in its reorganization proceeding before CERCLA's enactment. Respondents have not sought and the Third Circuit has not created the "exception to the rule of finality" that PCC posits. Rather, it is PCC that seeks an exception. CERCLA, unlike most statutes with significant impact on property rights, is retroactive. A retroactive statute alters the legal significance of previously "innocent" or neutral acts. Many entities have resisted the retroactivity of CERCLA for the same reason that PCC resists it here: polluting acts that had few onerous consequences when they were committed now carry unpredicted and often costly liabilities. The obligations imposed by CERCLA disturbed the settled expectations of corporate America. There is no reason to make an "exception" to this upheaval for the Penn Central Corporation.

C. PENN CENTRAL DID NOT APPEAL THE DISTRICT COURT'S HOLDING THAT IT COULD BE SUED FOR POST-CONSUMMATION INJURIES CAUSED BY PRE-CONSUMMATION POLLUTING ACTS AT THE PAOLI YARD AND SO CANNOT NOW ASSERT THAT THE CERCLA CLAIMS ARISING OUT OF THOSE SAME ACTS WERE DISCHARGEABLE.

In the district court opinions from which Respondents appealed to the Third Circuit the issue of whether

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[41] *Id.* at 203.

their CERCLA claims had been dischargeable, the district court, as compelled by the Third Circuit's *Schweitzer* opinion, also held that various individuals, Conrail, and SEPTA could pursue other direct and third-party claims against PCC. Those claims related to property damage and personal injuries that became manifest after the 1978 consummation of the Penn Central reorganization but had been allegedly caused by Penn Central's pre-consummation polluting acts at the Paoli Yard.[42] PCC did not appeal the district court holding permitting those claims and cannot now do so.

In effect, the question presented by PCC in its petition – whether it, as a reorganized company, can be held liable after its reorganization for claims predicated solely on polluting acts that took place before its reorganization – has already been decided against PCC by the district court in an unappealed holding interpreting the Consummation Order entered in PCC's own reorganization proceeding. This Court has stated that, without a cross appeal, a party cannot "attack [a] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree."[43] PCC, in its petition, is implicitly asking this Court to overturn or restrict the unappealed district court ruling in this case

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[42] *In the Matter of Penn Central Transportation Co.*, 92 B.R. 605, 610, 612-13 (E.D. Pa. 1988) (A33, A37-38).

[43] *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937) (quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)).

that Conrail, SEPTA, and various individuals can pursue other post-consummation claims against PCC arising out of the same pre-consummation polluting acts at the Paoli Yard. PCC's petition is improper and should be denied.

D. REVIEW OF THE THIRD CIRCUIT HOLDING WOULD INVITE THIS COURT TO ASSUME OR DECIDE THAT RETROACTIVE APPLICATION OF CERCLA IS CONSTITUTIONAL WHEN THAT ISSUE WAS NEITHER RAISED IN PCC'S PETITION NOR ADDRESSED IN THE COURT OF APPEALS.

In order to decide the question presented in this case – whether a claim under CERCLA can be discharged in a bankruptcy reorganization that was consummated before CERCLA's enactment – this Court must either assume that the retroactive application of CERCLA is constitutional or address for the first time this highly significant issue when it has neither been raised in PCC's petition nor briefed and argued in the court of appeals.

Rule 14.1(a) of this Court states that "only the questions set forth in the petition, or fairly included therein, shall be considered by the Court."[44] Only in the most exceptional cases will the Court consider issues not raised in the petition.[45] The Court is particularly hesitant to decide constitutional questions unnecessarily.[46]

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[44] *See also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976).

[45] *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976).

[46] *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978); *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954).

Furthermore, this Court ordinarily will not decide questions that were not raised or litigated in the court of appeals.[47] The court of appeals merely noted that both PCC and Respondents acknowledged that Congress had intended CERCLA to be retroactive and thus applicable to Penn Central as an owner and operator of the Paoli Yard for many years before 1976.[48] There are exceptions to Rule 14.1(a), and the Court has occasionally reviewed a question that has *either* been raised in the petition *or* addressed below.[49] The Court has declined, however, to reach a question that was *neither* raised in the court of appeals *nor* presented in the petition.[50]

If the Court were to agree to issue the writ that PCC seeks, it would either have to assume CERCLA's retroactivity without deciding it or address the constitutionality of CERCLA's retroactive application despite the fact that the issue was neither presented in PCC's petition nor considered in the court of appeals. If the Court chooses to deny PCC's petition, PCC may yet raise the issue of CERCLA's constitutionality. The Third Circuit has remanded this case to the district court with instructions to enter an order permitting Respondents to pursue their

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[47] *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

[48] 944 F.2d at 166 n.1 (A6).

[49] *See Gardebring v. Jenkins*, 485 U.S. 415, 425 n.12 (1988); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980).

[50] *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *City of Springfield v. Kibbe*, 480 U.S. 257, 260 (1987).

CERCLA claims against PCC in the cleanup actions previously instituted against Conrail and SEPTA.[51] As a defense to these claims, PCC can raise the issue of the constitutionality of CERCLA's retroactive application with full opportunity for all parties to brief, argue, and seek appellate review of that issue.

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[51] 944 F.2d at 169-70 (A16).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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